(20)

No. 93-714

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

U.S. BANCORP MORTGAGE COMPANY,

Petitioner,

v.

BONNER MALL PARTNERSHIP,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA SEARS, ROEBUCK & CO. ON THE MERITS IN SUPPORT OF RESPONDENT

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21 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases, continued: Page

Other Authorities: Page

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This *amici curiae* brief is submitted to support the position taken by Respondent Bonner Mall Partnership. Both Petitioner and Respondent have consented to the filing of this brief.

INTEREST OF THE *AMICI*

The interest of *amici* Izumi Seimitsu Kogyo Kabushiki Kaisha ("Izumi") and Sears, Roebuck & Co. ("Sears"), which sells Izumi-manufactured shavers, arises out of a matter that was recently before this Court, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S.Ct. 425 (1993) (per curiam). The issue presented in that case was whether this Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), supports the practice of the Court of Appeals for the Federal Circuit, and other courts of appeals, of routinely vacating final judgments when the parties resolve their disputes through settlement while the case is on appeal.

This Court's withdrawal of certiorari in *Izumi* left undisturbed the Federal Circuit's order vacating a final judgment by the United States District Court for the Southern District of Florida. *Izumi*, 114 S.Ct. at 425. In that case, Philips' claim of trade dress rights in its rotary electric shavers had been rejected by two separate juries, and ultimately by the Florida District Court. *Id.* at 425-26.

The Federal Circuit's order vacating the Florida judgment has directly and adversely affected Izumi and Sears. An action is now pending in the United States District Court for the Northern District of Illinois in which Philips seeks to assert against Izumi and Sears the same trade dress claim that had been rejected by the Florida District Court. Before the Federal Circuit's action, the Illinois District Court had barred Philips' trade dress claims as collaterally estopped by the Florida judgment. Now that the Federal Circuit has vacated the

Florida judgment, Philips' Illinois claims against Izumi and Sears have been reinstated.[1]

Thus, Izumi and Sears are in the rare position of having experienced first-hand the consequences that follow when *Munsingwear* is routinely construed as requiring vacatur after settlement irrespective of vacatur's effect on third parties, subsequent litigation, and the public. Because Izumi and Sears have each been directly affected by an interpretation of *Munsingwear* requiring vacatur whenever all the parties to an appeal reach a settlement, Izumi and Sears have a strong interest in the Court's present examination of the *Munsingwear* doctrine. Moreover, Izumi's and Sears' unique perspective on vacatur's consequences will assist the Court in its consideration of the issue now before it.

SUMMARY OF THE ARGUMENT

This Court has not decided whether a lower court judgment must be vacated when a case pending before this Court, or, in fact, any appellate court, is rendered moot by the parties' settlement. The Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), does not address the circumstances of settlement and does not mandate vacatur of a lower court decision merely because the parties reach a settlement while an appeal is pending. Moreover, in *Karcher v. May*, 484 U.S. 72 (1987), the Court interpreted *Munsingwear* as requiring vacatur only when mootness results

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[1] After granting Philips' motion to reinstate its trade dress claims against Izumi and Sears, the Illinois District Court certified to the Federal Circuit the question of whether a vacated judgment retains collateral estoppel and res judicata effect. The issue has been fully briefed, argued, and the parties are awaiting the Federal Circuit's decision.

from events beyond the control of the parties – a circumstance not involved in settlement.

While in some circuit courts vacatur is essentially automatic when the parties settle while the case is on appeal, other circuits, including the Ninth Circuit from which the present case arises, consider the effect of vacatur on judicial efficiency, the rights of third parties, and the public. These factors generally tilt against vacatur, and a trend toward denying vacatur when based solely on settlement has begun to emerge. Accordingly, the Court should adopt the view that vacatur upon settlement should be the exception rather than the rule.

ARGUMENT

I.

MUNSINGWEAR IS NOT DISPOSITIVE OF THE VACATUR ISSUE

This Court granted certiorari on the question of whether *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), requires vacatur when the parties reach settlement while the case is pending before the Court. The answer to this question is no: *Munsingwear* does not require – indeed does not address – vacatur under the circumstance of a voluntary settlement by the parties. Instead, *Munsingwear* indicates only that when mootness occurs by "happenstance" which renders the lower court judgment unreviewable, the proper course of action is to vacate that judgment.

Munsingwear does not require or provide authority for vacatur whenever a case becomes moot on appeal because the parties have settled. Mootness can arise in ways other than through the voluntary settlement of the

dispute by the parties to an appeal, such as through an action beyond the control of either party. In *Munsingwear,* mootness came about through a change in law which eliminated the controversy on appeal, and the opinion discusses vacatur solely in that context. *Id.* at 37-41. It did not involve or deal with mootness caused by settlement or any other voluntary act taken to end the litigation.

In *Munsingwear,* the U.S. Government had appealed a district court decision finding that Munsingwear's prices did not violate a pricing regulation that was in force at the time of the litigation. *Id.* at 37. During the pendency of the appeal, the Munsingwear products at issue were deregulated. *Id.* Although the U.S. Government still disagreed with the district court's decision, and wished to pursue that disagreement on appeal, the appeal was dismissed as moot. *Id.* In that circumstance, the Court in *Munsingwear* stated that vacating the district court judgment "clears the path for future re-litigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.* at 40.

In a voluntary settlement, the district court judgment does not become *unreviewable* because of circumstances beyond the control of the parties, *i.e.*, happenstance. Nor is it a case in which one of the parties actually wants review of the judgment. In these respects, a settlement differs fundamentally from the situation in *Munsingwear.*[2]

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[2] An important point for cases like *Munsingwear*, which involve the *Government*, is that a change of policy can moot a case through new legislation, new regulations, expiration of administrative orders, or new publicly announced interpretations of govern-

[footnote continued]

In *Karcher v. May*, 484 U.S. 72, 82 (1987), the Court confirmed that *Munsingwear* concerns only mootness by "happenstance" and not mootness created by the parties. *Karcher* involved a challenge to a New Jersey state statute permitting a minute of silence in public schools. *Id.* at 74-75. After the named defendants declined to defend the action, the presiding legislative officers intervened as defendants. *Id.* at 75. The district court declared the state statute unconstitutional, and the Third Circuit affirmed. *Id.* at 75-76.

While the *Karcher* case was pending before the Supreme Court, the intervenors lost their posts as presiding officers. *Id.* at 76. The new presiding officers voluntarily withdrew the appeal leading to dismissal of the appeal for lack of jurisdiction. *Id.* However, the intervenors asked the Court to vacate the lower court judgments of unconstitutionality. *Id.* at 81. This Court rejected that request, distinguishing the voluntary withdrawal of the appeal from the "happenstance" which caused mootness in *Munsingwear*, holding that "[t]his controvery did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party – the New Jersey Legislature – declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case." *Id.* at 83.

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ing law. When that happens, appellate review is made unavailable "as a matter of law," *Restatement (Second) of Judgments* §28 (1982), and not simply by the party's choice as a *litigant*. Such a formal change of government policy is not purely a litigation decision but, instead, is a legal action having "independent legal significance." *United States v. Western Elec. Co.*, 900 F.2d 283, 297 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990). Because of the independent legal effect of such a change of policy, it is an extra-litigation event, *i.e.*, happenstance as in *Munsingwear*, as distinguished from a litigation-based decision to forego an appeal or settle on appeal.

Karcher thus interprets *Munsingwear* as limited to a circumstance "unattributable to any of the parties." *Id.* A settlement, however, is attributable to both parties. *Munsingwear*, therefore, plainly does not control the disposition of a judgment when the parties settle on appeal.[3]

Prior to *Munsingwear*, in *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936) (per curiam), the Court said that "[w]here it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." However, as with *Munsingwear*, *Duke Power* involved a change in the underlying circumstances – not a deliberate decision by the parties to end the dispute through a settlement and forego the appeal. *Id.* at 261-67. Thus, *Duke Power* does not create a duty on the part of an appellate court to vacate a lower court judgment when the parties settle.

The Court has entered summary orders at times vacating lower court judgments. *See, e.g., City Gas Co. of Fla. v. Consolidated Gas Co. of Fla.*, 499 U.S. 915 (1991). However, *City Gas* and other such summary orders cannot fairly be interpreted as this Court's defin-

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[3] While *Karcher* may be viewed as involving withdrawal of an appeal rather than mootness, the *Karcher* Court plainly linked *Munsingwear* to cases in which the controvery becomes moot due to extra-litigation circumstances and distanced *Munsingwear* from cases in which the controversy ends when the losing party declines to pursue its appeal. *Id.*; *see also Clarendon Ltd. v. Nu-West Indus., Inc.*, 936 F.2d 127, 130 (3d Cir. 1991); *National Union Fire Ins. Co. of Pitt. v. Seafirst Corp.*, 891 F.2d 762, 766 (9th Cir. 1989); *Constangy, Brooks & Smith v. NLRB*, 851 F.2d 839, 842 (6th Cir. 1988); *United States v. Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988).

itive pronouncement that vacatur is required whenever disputes are settled while on appeal. Indeed, the Court has acknowledged that its summary decisions are of limited precedential value; they do not foreclose the Court from considering more fully questions previously disposed of summarily. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 308-09 n.1 (1976) (per curiam); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

For these reasons, neither the *Munsingwear* decision nor subsequent decisions or orders compel vacatur at any level of appeal simply because the parties settle their dispute and moot further review.

II.
CONSIDERING THE EFFECT OF VACATUR ON JUDICIAL ECONOMY, THIRD PARTIES, AND THE PUBLIC INTEREST, LOWER COURT JUDGMENTS GENERALLY SHOULD NOT BE VACATED SOLELY ON THE BASIS OF THE PARTIES' SETTLEMENT

While the courts of appeals have been split on the question of whether to vacate a district court judgment at the request of parties who settle the case,[4] the more reasoned approach is taken by those courts that seek to balance the parties' private interest in vacatur against the

[4] For example, in *In re United States*, 927 F.2d 626, 627 (D.C. Cir. 1991), the court denied a motion to vacate and held that "[w]e do not believe that vacatur is appropriate . . . when a matter has been mooted after judgment only because the parties have entered into a settlement . . . ." *See also Clarendon*, 936 F.2d at 130; *National Union*, 891 F.2d at 765-69; *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1303 (7th Cir. 1988). Other courts have routinely granted vacatur at the request of parties who settle on appeal. *See Federal Data Corp. v. SMS Data Prods. Group, Inc.*, 819 F.2d 277, 280 (Fed. Cir. 1987); *Nestle Co. v. Chester's Mkt., Inc.*, 756 F.2d 280, 283 (2d Cir. 1985).

facts bearing on the public interest in preserving the judgment.[5] In deciding whether to vacate, they correctly consider the possible adverse effects of vacatur on third parties, the public, and judicial efficiency, and give weight to the benefits of preserving the finality of the district court judgment.

The Seventh Circuit's decision in *Memorial Hospital* illustrates this approach. There, the parties jointly requested vacatur on settlement, but the court explained the importance of looking beyond the interests of the parties seeking vacatur, to consider vacatur's impact on future litigants and the courts:

> When the parties' bargain calls for judicial action . . . the benefits of settlement to the parties are not the only desiderata. The pact may affect third parties. . . . [I]t may be inappropriate to approve a settlement that squanders judicial time that has already been invested. The bankruptcy and district judges devoted many hours to this case and resolved it on the merits. Their decisions have persuasive force as precedent that may save other judges and litigants time in future cases.

862 F.2d at 1302.

The interests in preserving the finality of judgment and sparing future litigants from the burdens of having to defend against previously adjudicated claims have figured prominently in other decisions in which an automatic vacatur rule has been rejected. In *National*

[5] *See, e.g., In re United States*, 927 F.2d at 627-28; *National Union*, 891 F.2d at 769; *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722-23 (9th Cir. 1982).

Union, the Ninth Circuit refused to vacate a judgment adverse to the plaintiff because there were related actions brought by the plaintiff against third parties who had intervened in the motion to vacate for the express purpose of preserving that judgment. 891 F.2d at 764. The court emphasized that "[t]o the extent there may be preclusive effect, National Union should not be able to avoid those effects through settlement and dismissal of the appeal." *Id.* at 769.[6]

The Ninth Circuit has recognized that automatic vacatur plays havoc with the important interest of judicial finality, holding in *Ringsby* that:

> If the effect of post-judgment settlements were automatically to vacate the trial court's judgment, any litigant dissatisfied with a trial court's findings would be able to have them wiped from the books. "It would be quite destructive to the principle of judicial finality to put such a litigant in a position to destroy the collateral conclusiveness of a judgment by destroying his own right of appeal." That possibility would undermine the risks inherent in taking any controversy to trial and, in cases such as this one, provide the dissatisfied party with an opportunity to relitigate the same issues.

686 F.2d at 721 (quoting 1B James W. Moore et al., *Moore's Federal Practice* ¶0.416[6], at 2327 (2d ed. 1982)) (footnote omitted).

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[6] *Cf. Harrison W. Corp. v. United States,* 792 F.2d 1391 (9th Cir. 1986) (involving a dispute arising out of a government contract). In *Harrison,* the Government executed a second contract thereby precluding it from bringing any action related to the first. *Id.* at 1394. With no possibility of re-litigation, the court vacated. *Id.*

In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971), however, this Court recognized the unfairness of requiring defendants to relitigate issues decided in prior litigation:

> In any lawsuit where a defendant . . . is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses – productive or otherwise – to relitigation of a decided issue.

Id. at 329.

To the same effect, the Court has explained the importance of the collateral estoppel doctrine: "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 440 U.S. 147, 153-54 (1979) (citations omitted).

Izumi and Sears do not believe it is unfair to saddle an appellant who settles with the preclusive and precedential effects of an unreviewed judgment. Where such a party causes the dismissal of its own appeal, it is in "no position to complain that [its] right of review . . . has been lost." *Ringsby,* 686 F.2d at 722.[7]

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[7] *See Center for Science in the Pub. Interest v. Regan,* 727 F.2d 1161, 1166 (D.C. Cir. 1984); *see also, Garde,* 848 F.2d at

[footnote continued]

Moreover, when a party foregoes or dismisses its appeal without settlement, it is clear that res judicata and collateral estoppel apply to that unreviewed judgment.[8] It is no more unfair to apply claim or issue preclusion where parties voluntarily forego appellate review following settlement. As the Seventh Circuit has noted:

> *Munsingwear* holds that the judgment in a moot case should be vacated to relieve the parties of colleteral consequences when they were unable to obtain appellate review. The [appellant here] were not disabled from obtaining review; they have simply chosen, for reasons they deem sufficient, to forego the entitlement they possess.

Memorial Hosp., 862 F.2d at 1301.[9]

1311 (denying vacatur when the appeal became moot as a result of the Government's substantial compliance with the terms of the appealed decision); *accord Constangy*, 851 F.2d at 842; *Westmoreland v. National Transp. Safety Bd.*, 833 F.2d 1461, 1463 (11th Cir. 1987). In *Garde*, the court held that:

> The distinction between litigants who are and are not responsible for the circumstances that render the case moot is important. We do not wish to encourage litigants who are dissatisfied with the decision of the trial court to have them wiped from the books by merely filing an appeal, then complying with the order or judgment below and petitioning for a vacatur of the adverse trial court decision.

848 F.2d at 1311 (citations omitted).

[8] *See Munsingwear*, 340 U.S. at 39; *Ringsby*, 686 F.2d at 722. In any event, res judicata or collateral estoppel take effect upon final judgment whether or not an appeal is taken. 1B James W. Moore et al., *Moore's Federal Practice* ¶0.416[3], at III-318 (2d ed. 1993).

[9] *See also Clarendon*, 936 F.2d at 130 (expressing approval of the approach taken in *Memorial Hospital*, and viewing *Munsing-*

[footnote continued]

While the prospect of vacatur of a judgment having potential adverse preclusive effects can be an inducement for a party to settle on appeal, it also can be an inducement for the parties to go through trial and district court judgment. If judgments are *not* routinely vacated, the parties would be encouraged to settle their dispute as early as possible, thereby substantially easing the judiciary's burden. "If parties want to avoid stare decisis and preclusive effects, they need only settle before the district court renders a decision, an outcome our approach [of generally denying vacatur] encourages." *Memorial Hospital*, 862 F.2d at 1302.

Vacatur based on settlement rather than substantive review of the merits of a lower court decision erases presumably correct judgments that have been entered after careful deliberation by courts and juries.[10] Vacatur on

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wear as only dealing with an appeal mooted by circumstances beyond either party's control so that the parties are unable to obtain appellate review). The court in *Clarendon* regarded *Karcher*, where this Court held vacatur to be inapplicable, as bearing a closer resemblance to settlement than *Munsingwear*. *Id.*

[10] While there is a difference between circuit court review as a matter of right of district court judgments and Supreme Court discretionary review of the circuit court decisions, there should be no distinction in the practice concerning vacatur based on settlement. If the Court has, in accepting discretionary review, concluded that there likely is a flaw in the circuit court's decision or holding, the Court may take that into account in determining whether the public interest is better served by preserving the finality of the judgment below or by vacatur. However, the granting of certiorari does not necessarily mean that the Court considers or would hold that the appellate court's decision or reasoning is wrong. Furthermore, if the parties settle after the circuit court decision and opinion are issued, but before Supreme Court review, the circuit court is not likely to vacate its own decision and opinion. Even the Second Circuit, which routinely grants vacatur of district court judgments on the basis of settle-

[footnote continued]

settlement therefore has profound implications for the public interest in finality of judgments. Indeed, some commentators have criticized the practice.[11]

The Seventh Circuit noted in *Memorial Hospital* that:

> When a clash between genuine adversaries produces a precedent, however, the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property.

862 F.2d at 1302.

More recently, a trend against denying vacatur when based solely on settlement has begun to emerge. Both the Second and Tenth Circuits have refused requests to vacate their own decisions when parties have reached settlement after the appellate court had decided the case. *Manufacturers Hanover,* 11 F.3d at 385; *Oklahoma Radio Assocs. v. FDIC,* 3 F.3d 1436, 1444 (10th Cir. 1993). Echoing the Seventh Circuit, the Court in *Oklahoma Radio* observed:

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ment, does not vacate its own decision and opinion simply because the parties settle. *Manufacturers Hanover Trust Co. v. Yanakas,* 11 F.3d 381, 385 (2d Cir. 1993).

[11] *See* Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur,* 76 Cornell L. Rev. 589 (1991); Note, *Avoiding Issue Preclusion by Settlement Conditioned Upon the Vacatur of Entered Judgments,* 96 Yale L.J. 860, 867 (1987) (explaining that "[c]ircumventing preclusion by vacating existing judgments threatens the public interests in finality of judgments, judicial economy, legitimacy of the legal system, and consistency").

> The furthering of settlement of controversies is important and desirable, but there are significant countervailing considerations which we must also weigh. A policy permitting litigants to use the settlement process as a means of obtaining the withdrawal of unfavorable precedents is fraught with the potential for abuse. We agree with the Seventh Circuit that "an opinion is a public act of the government, which may not be expunged by private agreement."

3 F.3d at 1444 (quoting *Memorial Hospital,* 862 F.2d at 1300).

Moreover, in *Manufacturers Hanover,* the Second Circuit, citing Justice Steven's dissent in *Izumi,* identified at least two abuses produced when decisions are vacated following settlement:

> First, it would allow the parties to obtain an advisory opinion of the court of appeals in a case in which there may not be, or may no longer be, any genuine case or controversy; the federal courts of course have no jurisdiction to render such opinions. Second, even where there was a genuine case or controversy, it would allow a party with a deep pocket to eliminate an unreviewable precedent it dislikes simply by agreeing to a sufficiently lucrative settlement to obtain its adversary's cooperation in a motion to vacate. We do not consider this a proper use of the judicial system.

11 F.3d at 384 (citing *Izumi,* 114 S.Ct. at 431 (Stevens, J., dissenting from dismissal of certiorari as improvidently granted)). While the first potential abuse would arise

only when parties seek to vacate an appellate decision, the second potentially exists whenever *Munsingwear* is construed as requiring vacatur following settlement.

Significantly, both the Tenth Circuit in *Oklahoma Radio,* and the Second Circuit in *Manufacturers Hanover,* concluded that neither *Munsingwear* nor any other decision of this Court require vacatur following a voluntary settlement of litigation. Instead, in evaluating whether to exercise their discretionary power to vacate their own decisions (and in declining to do so), these courts focused on interests beyond the private interest of the litigants. Izumi and Sears submit that the same approach should govern the vacatur analysis at every stage of the litigation continuum, whether vacatur is requested before, during, or after an appeal.

The discretionary power to vacate should not be unbridled. Instead, it should be tethered by the interest of judicial efficiency, the rights of third parties, and the public interest, and demands for vacatur following settlement should be rejected where one or more of these important interests would be substantially and adversely affected.

CONCLUSION

For the foregoing reasons, Izumi and Sears submit that this Court's decision in *Munsingwear* does not mandate vacatur merely because the parties reach a settlement while an appeal is pending. Instead of automatically vacating decisions following settlement, courts should consider the vacatur's potential impact on judicial efficiency, the rights of third parties and the public interest, and should reject vacatur on demand in circumstances where one or more of these important interests would be compromised.

Respectfully submitted,

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